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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 477 MISC.

JAMES FARNSWORTH,

Petitioner,

against

JOHN F. FOSTER, as Warden, New York State Prison, Auburn, New York, or his successor,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Statement of the Case 1

Facts 2

POINT I—Petitioner's Application for a Writ of Habeas Corpus was properly denied by the District Court 4

Conclusion 6

CASES CITED.

Darr v. *Burford*, 18 U. S. L. W. 4217 (Decided Apr. 3, 1950) 5

Ex parte Hawk, 321 U. S. 114 ..... 4, 5

Mooney v. *Holohan*, 294 U. S. 103 ..... 4, 5

U. S. v. *Tyler*, 269 U. S. 13 4

STATUTE CITED.

28 U. S. C. A. § 2254 4

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the respondent in the above entitled cause by the Attorney General of the State of New York, opposes the petition herein and asks that it be denied.

Statement of the Case

The petitioner prays for a writ of certiorari to review a decision of the United States District Court for the Northern District of New York (Hon. Stephen W. Brennan, Judge) which denied petitioner's application for a writ of habeas corpus. Thereafter an unsuccessful application was made to the District Court for the issuance of a certificate of probable cause. On March 8, 1950 the United

States Court of Appeals for the Second Circuit denied a similar application and ordered that the appeal therein be dismissed.

Facts

On March 26, 1947 petitioner was convicted of the crime of attempted burglary, third degree, and was sentenced by the County Court of Westchester County as a fourth felony offender, to a term of 15 years to life. On April 16, 1947 he filed a notice of appeal in the Appellate Division of the Supreme Court, Second Judicial Department. On June 18, 1947 he moved that court for leave to appeal as a poor person, for a copy of the trial minutes and for the assistance of counsel. This motion was denied on June 30, 1947. On November 5, 1947 the People moved to dismiss the appeal for petitioner's failure to perfect the appeal. This motion was denied and appellant's time to appeal was enlarged to the January 1948 term of court. On January 26, 1948 appellant again moved for leave to appeal as a poor person and on February 4, 1948 said motion was denied.

On February 9, 1948 the Appellate Court granted respondent's motion to dismiss the appeal because of appellant's failure to file a record and brief. Appellant then applied for leave to appeal to the Court of Appeals. This was denied by Mr. Justice Sneed, Associate Justice of the Appellate Division, on March 8, 1948.

While the appeal was pending the petitioner secured a writ of habeas corpus in the New York State Supreme Court which was dismissed after a hearing on July 30, 1947. The order of dismissal was affirmed by the Appellate Division, Fourth Judicial Department on August 27, 1947.

Thereafter a motion for leave to appeal to the Court of Appeals was granted and counsel was assigned by the Court to represent the petitioner in the preparation and argument of his appeal. On October 17, 1948 the order of the Appellate Division was affirmed without opinion. The petitioner did not apply for certiorari to review the decision of the Court of Appeals.

Shortly after the affirmance by the Court of Appeals the petitioner sought a writ of habeas corpus in the United States District Court, Northern District of New York. Mr. Justice Brennan in dismissing the petition on November 13, 1948 said that it would be a useless procedure for the District Court and the Circuit Court of Appeals to pass upon the denial of petitioner's rights while the way was open for a direct review by certiorari in the United States Supreme Court. Thereafter three other applications for habeas corpus were addressed to the District Court, all of which were denied.

On January 17, 1949 petitioner moved the County Court of Westchester County for an order in the nature of *coram nobis*, vacating and setting aside the judgment of conviction rendered by that court on March 26, 1947. The motion was denied by that Court on March 8, 1949. He thereafter appealed from the above order to the Appellate Division, Second Judicial Department and moved that Court for an order directing the County Court of Westchester County to reinstate and hear his application in the nature of *coram nobis* or in the alternative for leave to appeal as a poor person. This motion was denied on April 25, 1949. He then applied to Chief Judge Loughran of the New York State Court of Appeals for permission to appeal to that Court. Judge Loughran on June 3, 1949 denied the application saying he was without jurisdiction.

On June 28, 1949 petitioner applied to the United States District Court for a certificate of probable cause which was subsequently denied on August 1, 1949. An application for the same relief was made to the United States Court of Appeals for the Second Circuit. On or about March 8, 1950 that Court denied the petition for a certificate of probable cause and dismissed the appeal.

POINT I

Petitioner's application for a writ of habeas corpus was properly denied by the District Court.

The rule defined in *Ex parte Hawk*, 321 U. S. 114 and set forth in 28 U. S. C. A. § 2254, that all appellate remedies including an application for certiorari to the United States Supreme Court be invoked and exhausted before the petitioner is permitted to secure a writ of habeas corpus in the Federal courts is a complete bar to the relief sought in the instant case. Not only has petitioner failed to secure a review of his conviction by appeal but he did not attempt to secure a review by this Court of an affirmance by the New York Court of Appeals of the dismissal of habeas corpus.

Further petitioner did not perfect his appeal from the denial of *coram nobis* but preferred to consider the denial of his motion for permission to appeal as a poor person as an exhaustion of State remedies. However, as said by this Court in the case of *United States* v. *Tyler*, 269 U. S. 13, lack of financial ability to perfect an appeal cannot be considered a denial of constitutional rights.

In the case of *Mooney* v. *Holohan*, 294 U. S. 103 this Court established the rule that available collateral remedies in the State tribunals must be exhausted in addition to direct appeal from the judgment of conviction. Not only

did petitioner fail to perfect his appeal from the judgment of conviction; he also failed to perfect his appeal from the denial of a writ of *coram nobis* and did not attempt to secure a review of the affirmance by the New York State Court of Appeals of the dismissal of habeas corpus.

Any doubt that might have existed regarding the necessity of seeking review by this Court before applying for habeas corpus in the Federal District Court was completely resolved by the case of *Darr* v. *Burford*, decided April 3, 1950, 18 U. S. L. W. 4217. It was therein stated:

> "Since the states have the major responsibility for the maintenance of law and order within their borders, the dignity and importance of their role as guardians of the administration of criminal justice merits review of their acts by this Court before a prisoner, as a matter of routine, may seek release from state process in the district courts of the United States. * * * From this conviction springs the requirement of prior application to this Court to avoid unseemly interference by federal district courts with state criminal administration."

In the light of the *Mooney* case requiring an exhaustion of available collateral remedies in the State's tribunals; the *Hawk* case requiring an exhaustion of all State appellate remedies and the *Darr* case requiring a review by this Court before applying for habeas corpus in the District Court, the Federal District Court had no alternative but to deny the application for a writ of habeas corpus.

CONCLUSION

It is respectfully submitted that the petition should be denied.

Dated: Albany, New York, April 24, 1950.

Respectfully submitted,

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